NO. 89-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The argument of Respondent Gearench, Inc., in its Brief in Opposition, emphasizes the error of the Court of Appeals. Gearench states that after the second decision of the Court of Appeals, its counsel has "prepared amended pleadings and gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein." (Gearench's Brief at 9). Gearench had the burden of introducing evidence of jurisdiction at trial, however, not after the second appeal of the case. In fact, this Court has specifically rejected similar attempts on appeal to supplement the record in order to avoid dismissal on jurisdictional grounds. *Henneford v. Northern Pacific Ry.*, 303 U.S. 17, 19 (1938).

Gearench attempts to extend the language of 28 U.S.C. § 1653 so as to permit not only amendment of defective allegations of jurisdiction, but also introduction of the proof that Gearench should have proffered at trial. Gearench can cite no case from this Court which permits such an interpretation of 28 U.S.C. § 1653 and, in fact, both the language of the Statute and its recent interpretation by this court in *Newman Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989) are to the contrary. The Statute permits the parties only to rectify defective *allegations* of jurisdiction, not a defective record with insufficient proof.

Gearench's argument turns on its head the rule that parties who fail to establish the facts supporting their

claim must suffer a dismissal. Gearench contends that it is a "novel" interpretation of the language of 28 U.S.C. § 1653 (permitting amendment of "defective allegations of jurisdiction") to construe it as allowing amendment of pleadings but not introduction of supplemental evidence. Instead, Gearench argues the Statute permits introduction of evidence to support a new theory of jurisdiction on remand of the case. It is not novel to insist that the party bearing the burden of proof introduce evidence at trial.

What is novel is for a party to try a case on one theory, and then, after losing on that ground, request a remand to plead and prove a different theory. Gearench was content to allow the case to be tried based on assertions of admiralty jurisdiction, although the existence of admiralty jurisdiction was stipulated to be a contested issue of law. After losing on that ground, Gearench now seeks to plead and prove a new basis for jurisdiction. It would be novel indeed to interpret a statute permitting amendment of defective allegations of jurisdiction as authorizing a retrial of the case on a different theory.

This Court has repeatedly ruled that the failure to introduce evidence of jurisdiction mandates a dismissal of the case. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921). Gearench does not cite these cases or address their holdings. Gearench merely cites the comments of the panel of the Court of Appeals that "Gearench had no notice" of a defect in jurisdiction prior to the second appeal. The fact that jurisdiction was contested in every answer, including Gearench's

answer, and the fact that the pretrial stipulations stated that admiralty jurisdiction was a contested issue, were all the notice necessary under *McNutt, KVOS,* and *Soley* to require that Gearench introduce evidence of jurisdiction or suffer a dismissal. Consequently, jurisdiction must be determined on "the facts presented." *McNutt,* 298 U.S. at 189; *Soley,* 257 U.S. at 221.

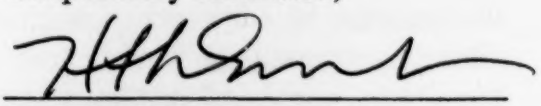
In addressing the failure to establish jurisdictional facts, this Court has dealt with the precise situation that exists in the case at bar and has rejected the argument made by Gearench in its Brief. In *Henneford v. Northern Pacific Ry.,* 303 U.S. 17 (1938), it appeared from the complaint that there was no jurisdiction because the amount in controversy was $2,044.08. The Appellee moved for leave to file an affidavit to supplement the record to show that the amount in controversy *in fact* exceeded the amount necessary to establish jurisdiction. In denying the motion, the Court stated: "The Court is of the opinion that the jurisdiction of the District Court should be tested by the case made by the bill of complaint." *Id.* at 19. The district court judgment in favor of the Appellee was reversed and remanded with directions to dismiss the case for want of jurisdiction. *Id.* Similarly, Gearench now claims to have "gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein." (Gearench's Brief at 9). As in *Henneford,* it is too late to introduce supplemental evidence to establish jurisdiction.

In conclusion, the jurisdiction of the federal district court must "affirmatively appear in the record." *Mansfield C. & L.M. Ry. v. Swan,* 111 U.S. 379, 382 (1884). It is too late on appeal to introduce the evidence necessary

to establish jurisdiction. This is not a case where an amendment is being made to conform the pleadings to the evidence introduced at trial. Rather, it is a case in which Gearench seeks to amend pleadings to conform to new evidence while simultaneously introducing new evidence to conform to the amended pleadings. It is an "inflexible" rule in this circumstance that the court dismiss the case, *id.*, and the Court of Appeals erred in remanding the case to introduce evidence of a new basis for jurisdiction. *Henneford,* 303 U.S. at 19.

Wherefore, Columbus-McKinnon respectfully prays that this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT have been forwarded to Mr. Jeffrey A. Rhodes by United States Mail on this the 22 day of November, 1989.

KENNETH G. ENGERRAND